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Supreme Court, U.S.
FILED
JAN 10 2003
OFFICE OF THE CLERK

No. 02-479

In The
Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA,

Petitioner,

vs.

MICHAEL J. HASON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Eleventh Amendment bar suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness?

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OPINIONS BELOW

The initial decision of the United States Court of Appeals for the Ninth Circuit, dated February 12, 2002, concluded that Congress validly abrogated the State's Eleventh Amendment immunity in the Americans With Disabilities Act (ADA.) It is set forth at Pet. App. 1-13, and published at 279 F.3d 1167. The June 26, 2002 order denying a petition for rehearing en banc, with its dissenting opinion, appears in the Appendix at Pet. App. 26-36, and is published at 294 F.3d 1166. The judgment of the United States District Court for the Central District of California, filed April 27, 2002, is set forth in Appendix at Pet. App. 14, and the February 1, 2000 Report and Recommendation of the Magistrate Judge, adopted by the judgment, is set forth in the Appendix at Pet. App. 17-25.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit, denying the Petition for rehearing en banc, was filed and entered on June 26, 2002, and is now final. This Court has jurisdiction to review the decision by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment of the United States Constitution states:

> The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one

> of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Const. amend. XI.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

Title II of the Americans With Disabilities Act of 1990 provides in pertinent part:

> The term "public entity" means –
>
> (A) any State or local government;
>
> (B) any department, agency, special purpose district, or other instrumentality of a State. . . .

42 U.S.C. § 12131.

> . . . . [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

> entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

Title V of the Americans With Disabilities Act of 1990 provides in pertinent part:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

42 U.S.C. § 12202.

Title V, Section 514 also states that:

> Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

42 U.S.C. 12213.

STATEMENT

This case comes before the Court in a limited context, *viz.*, the decision by a state medical-licensing board to deny issuance of a license to practice medicine, on the ground of mental illness; no other deprivation of Title II

rights is in issue. Ignoring available state-court remedies for judicial review, Michael Hason, Respondent herein, sued the Medical Board of California for injunctive relief and damages in United States District Court, alleging that the denial of his license application violates the Americans with Disabilities Act (ADA). The Board's objection to the federal court proceeding on Eleventh Amendment grounds, based on this Court's decision in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (*Garrett*), was sustained by the district court, but the dismissal of the action was later overruled by the Ninth Circuit.

1. The analysis in this case rests on well-trod constitutional ground exploring the relationship between the Eleventh Amendment and Section 5 of the Fourteenth Amendment, see *e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999), and is an inevitable sequel to *Garrett*. In that case this Court concluded that Congress' attempt to abrogate the Eleventh Amendment under Title I of the ADA exceeded its authority. The same result is compelled as to Title II, which prohibits disability discrimination by public entities in the issuance of professional and vocational licenses.[1]

[1] The Court declined to grant certiorari on the second question presented by the Board's petition: "Does Title II of the ADA limit the authority of the California Medical Board to deny an applicant licensure as a physician because of the applicant's mental illness?" Accordingly, the Board assumes, for purposes of the instant argument, that Title II does include within its regulatory scope the Board's authority to issue medical licenses. Nevertheless, the Court need not reach the constitutional question if it appears that the Ninth Circuit erred in its

(Continued on following page)

Petitioner Medical Board of California does not dispute the wisdom of the ADA, its laudable goals of eliminating societal discrimination on the basis of mental or physical disabilities, or that the ADA is "a milestone on the path to a more decent, tolerant, progressive society." *Garrett,* 531 U.S. at 375 (Kennedy, J., concurring). Nor does the Board dispute that the ADA is entirely proper legislation under the Commerce Clause. Rather, this case rests only on the issue of state sovereign immunity and its abrogation under the Fourteenth Amendment. The Court has made clear that only *appropriate* Congressional legislation enacted pursuant to Congress' authority under Section 5 of the Fourteenth Amendment will abrogate "[t]he ultimate guarantee of the Eleventh Amendment . . . that nonconsenting States may not be sued by private individuals in federal court." *Garrett,* 531 U.S. at 363, citing *Kimel v. Florida Bd. of Regents,* 528 U.S. at 73.

2. In 1995, Michael Hason applied to the California Medical Board for a license to become a physician in California.[2] In 1996, pursuant to the Board's mission to

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construction of Title II to encompass individual professional and vocational licensing decisions.

[2] The California Medical Board (the Board) is an agency within the California Department of Consumers Affairs charged with administering the provisions of California's Medical Practice Act. Cal. Bus. & Prof. Code § 2000, et seq. The Board consists of a Division of Licensing and a Division of Medical Quality. Cal. Bus. & Prof. Code § 2003. The Board's Division of Licensing is responsible for the issuance of medical licenses. Cal. Bus. & Prof. Code § 2005. The Division of Medical Quality is charged with disciplining licensed physicians who violate the Medical Practice Act. Cal. Bus. & Prof. Code § 2004. The Board's primary purpose is protection of the public and ensuring the safe practice of medicine in the State. Cal. Bus. & Prof. Code § 2229.

protect the public health and safety, the Board denied his application for a medical license on the basis of his history of untreated mental illness and multiple drug dependency. Pet. App. 38-39, 43-44 ¶ 1, 14-16. Hason sought administrative review of the Board's decision, and the denial was affirmed after hearing, effective March 1998. Pet. App. 38, 45, ¶¶ 1, 24. Hason did not seek state court review of the administrative decision, although such review was indeed available. *See* Cal. Govt. Code § 11523, Cal. Code Civ. Proc. § 1094.5. Nor did he file any action under California's extensive anti-discrimination statutes. See, *e.g.*, California's Fair Employment and Housing Act, Cal. Govt. Code § 12944, which prohibits state licensing boards from unlawful discrimination on a variety of bases, including the basis of a mental or physical disability. Instead, on April 21, 1999, respondent sued the Board in federal court, seeking twenty million dollars in damages (and twenty million in punitive damages) and alleging, in part, that the Board violated Title II of the ADA. Pet. App. 37-55.[3]

[3] In 2000, Hason filed a second application with the Board for a medical license. In 2001, he successfully passed the Board's psychiatric evaluation. Based solely on his second application, the parties stipulated that the Board would grant him a probationary medical license, with various terms and conditions. Though now licensed, Hason may not yet practice medicine until he passes a prescribed examination demonstrating his medical competence, a condition that is applied to all probationary licensees who have not practiced medicine for a substantial period. Despite these events, because Hason is prosecuting an action against the Board for *damages*, based on the Board's first denial of his application, this matter is not moot. Cf., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990).

The district court granted the Board's motion to dismiss Hason's action on grounds of sovereign immunity under the Eleventh Amendment. Pet. App. 14. The Ninth Circuit reversed. Pet. App. 3. Reasoning that this Court's opinion in *Garrett*, was not binding precedent because that opinion applied only to Title I of the ADA, the Ninth Circuit held that California's denial of a medical license to Hason stated a cause of action for discrimination under Title II of the ADA. Pet. App. 5-7. However, the Ninth Circuit also declined to apply the three-part analysis set forth in *Garrett*, concluding that the holding in this case would still be governed by the analysis found in two pre-*Garrett* Ninth Circuit opinions: *Clark v. State of California*, 123 F.3d 1267 (9th Cir. 1997) and *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999), both of which hold that the State is subject to suit under the ADA despite the Eleventh Amendment. Pet. App. 5-6, 10.[4]

Against this backdrop, Petitioner contends that by permitting damage suits to review individual professional licensing decisions by state agencies, Congress exceeded its grant of authority under section 5 of the Fourteenth Amendment.

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[4] The court also concluded that Title II of the ADA applies to licensing activities of the Medical Board, held that individuals could be sued in their official capacities for future injunctive relief under *Ex Parte Young*, and dismissed the individual defendants in their personal capacities. This Court declined to review the first of these conclusions. None of the other issues is before the Court in this proceeding.

SUMMARY OF ARGUMENT

Despite the undeniable importance of the question involved, very little in the way of new jurisprudence is presented by this case. The analysis to be applied to the question was laid out with clarity and certainty by this Court in *Garrett*. Under that analysis, the Court will inquire whether, in purporting to exercise its remedial and prophylactic authority under Section 5 of the Fourteenth Amendment, Congress has overstepped its powers. As this Court explained in *Garrett* and prior precedent, Congress may overstep its authority under Section 5 either by seeking effectively to elevate *constitutional* conduct to the status of *unconstitutional* conduct, in derogation of this Court's authority under Section 1 of the Fourteenth Amendment, or by stripping the States of their immunity under the Eleventh Amendment as a remedy that is out of all proportion to any evidence that unconstitutional conduct by the States calls for such a deprivation of the States' constitutional rights.

Just as the Court in *Garrett* chose to distinguish between Title I and Title II of the ADA for purposes of constitutional analysis, leaving consideration of Title II-issues for another day, 531 U.S. at 360 n.1, the Court is not required to treat Title II as a singularity in order to dispose of the dispute between the parties here. As construed by the Attorney General pursuant to Congressional directive, see 42 U.S.C. § 12134(a); 28 C.F.R. § 35.130, Title II can encompass a variety of qualitatively very different kinds of activities undertaken by state and local government, from constructing and remodeling buildings to providing telecommunication services to the public. The evidence underlying enactment of the ADA would not seem to support an inference that Congress saw a need to

remedy a pattern of invidious discrimination by States on the basis of disability in any activity encompassed by Title II, but the Court need not undertake such a broad inquiry in order to resolve this case. In light of the important public interests obviously intended to be furthered by Congress, the Court could properly use this case to provide overarching guidance in the context of state licensing activities, leaving it for the lower courts to assess the constitutional validity of abrogation under Title II in the context of the various other classes of governmental activities that are subsumed within the phrase "services, programs, or activities." 42 U.S.C. § 12132. See, *e.g.*, *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.")

Even under a focused approach to resolution of this dispute, the fundamental three-part analysis will be the same and is dictated by *Garrett*. Under this methodology, the Court will first define the "metes and bounds" of the constitutional right in question, see *Garrett*, 531 U.S. at 368, then proceed to determine whether, in purporting to exercise its authority under Section 5, Congress was responding to evidence of a pattern of historic unconstitutional discrimination by States against persons based on disability. *Ibid.* Finally, the Court will consider whether the burdens imposed on States are "congruent and proportional" to the evidence of unconstitutional discriminatory conduct by States. *Id.* at 372-74.

Applying the *Garrett* methodology in this case, it is evident that *Garrett* confirmed that the constitutional propriety of state discrimination based on disability is to

be measured by a "rational basis" test. 531 U.S. at 367-68. Congress could properly exercise its authority under Section 5 to abrogate Eleventh Amendment immunity, then, only to remedy or prevent *unconstitutional*, *i.e.*, irrational, discrimination by States on the basis of disability. It is not enough that there may be evidence that some facially neutral state actions may have the effect of discriminating against persons with disabilities; only invidious discrimination based on disability is unconstitutional.

But as was the case in *Garrett*, the legislative record underlying the ADA reveals no such pattern of unconstitutional discrimination by States, much less in the context of state licensing. Indeed, as the Court recognized in *Garrett*, to the extent that the legislative record expressly addresses actions by state governments, it tends to demonstrate a congressional awareness that States were ahead of Congress in enacting prophylactic and remedial legislation for persons with disabilities.

And, finally, as was the case in *Garrett*, the minimal, anecdotal evidence of discrimination by States based on disability – even if it were assumed that the evidence related to unconstitutional discrimination – is so limited in scope and severity as to provide no sufficient basis for the extraordinary remedy of abrogating the States' immunity under the Eleventh Amendment for purposes of challenging state licensing actions. Even in those limited instances of *invidious* discrimination, aggrieved individuals would have the ability to seek prospective injunctive relief against the offending officials pursuant to *Ex parte Young*, 209 U.S. 123 (1908). Indeed, the remedy of abrogation is as disproportionate to the scope of the assumed evil to be remedied, as the burdens imposed on States are "incongruent" with an effort to remedy that assumed evil.

Just as the Court found to be the case with respect to Title I of the ADA, Title II imposes a higher level of scrutiny of justifications for failure to make accommodation for disability in licensing procedures and requirements than the "rational basis" standard required by the Constitution itself.

Nothing in this case justifies departure from the Court's analysis and conclusion in *Garrett*. The decision of the Ninth Circuit should be reversed.

ARGUMENT

BASED ON THIS COURT'S RECENT DECISION IN *GARRETT*, THE CONCLUSION IS INESCAPABLE THAT CONGRESS EXCEEDED ITS FOURTEENTH AMENDMENT POWERS BY ABROGATING ELEVENTH AMENDMENT IMMUNITY FOR CHALLENGES TO STATE PROFESSIONAL AND VOCATIONAL LICENSING DECISIONS

A. The Court's *Garrett* opinion set forth the three-part test for assessing whether Congress acted unconstitutionally in abrogating Eleventh Amendment immunity from federal-court suits alleging unlawful discrimination based on disability under the ADA.

Two years ago, this Court in *Garrett* held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by abrogating state sovereign immunity with respect to alleged violations of Title I of the ADA. The Court declined to reach the question whether Title II of the same statutory scheme is appropriate legislation under Section 5. *Garrett*, 531 U.S. 360 n. 1.

In reaching its conclusion with respect to Title I, the Court engaged in a three-step inquiry predicated on the language of the Fourteenth Amendment itself. Drawing upon its earlier analysis in *City of Boerne v. Flores,* 521 U.S. 507 (1997), the Court reaffirmed that, under Section 5 of the Fourteenth Amendment, Congress' power is limited to remedy and prevention of violations of the rights guaranteed by Section 1, and that it is the province of the Court to define the substance of those Section 1 guarantees. *Garrett*, 531 U.S. at 365. Under the Court's reasoning, the three-part test serves to ensure that the operative effect of congressional abrogation under Title I is not transformation of *statutory* rights into ersatz *constitutional* rights not otherwise protected by Section 1.

Applying the three-part methodology, the Court first identified the scope of the Section 1 constitutional right as the right to be free from a failure by States, without a rational basis, to make special accommodation for disabilities in employment decisions. 531 U.S. at 365-68. Next the Court inquired whether Congress' decision to exercise its authority under Section 5 was grounded in evidence of a pattern of unconstitutional discrimination by the States against persons with disabilities, *id.* at 368-72, concluding that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational *state* discrimination." *Id.* at 368 (emphasis added). Nevertheless, assuming the existence of some evidence of unconstitutional state discrimination as might justify exercise of remedial authority under Section 5, the Court proceeded to apply the "congruence and proportionality" test articulated in *City of Boerne. Id.* at 372-74. That is to say, the Court considered whether the remedy provided

under Title I is "congruent" with the elimination of identified unconstitutional discrimination by States, cf. *City of Boerne*, 521 U.S. at 530, and whether, in light of the evidence, the remedy of abrogation of sovereign immunity is a "proportional" response to the targeted violation by States. See *id.* at 531. Distinguishing the paucity of evidence of invidious state discrimination in employment of disabled persons from the overwhelming evidence of historic and pervasive state discrimination against minorities that underlay enactment of the sweeping Voting Rights Act, *id.* at 373, citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court concluded that even the evidence of unconstitutional state discrimination arguably explaining application of Title I to States could not justify abrogation of sovereign immunity otherwise guaranteed to the States by the Eleventh Amendment. The Court noted specially that Title I imposes on States a burden of justifying their failure to make special accommodation for disability that is greater than the burden demanded by Section 1 of the Fourteenth Amendment itself. *Garrett*, 531 U.S. at 327-73.

Nothing in the instant case justifies a departure from the three-step analysis applied by the Court in *Garrett*. The question presented here is whether Congress exceeded its Section 5 powers by abrogating Eleventh Amendment immunity for alleged failure by a State to make accommodation for disability in the issuance of professional and vocational licenses.

B. The Court may properly resolve this dispute by holding that Congress exceeded its Fourteenth Amendment powers with respect to the specific activity at issue – professional and vocational licensing – rather than considering Title II of the ADA *in toto*.

To resolve the dispute between the parties before the Court, it is not necessary for the Court to decide whether congressional abrogation of sovereign immunity under Title II is unconstitutional with respect to every type of state activity that may be subject to that Title; the Court need only consider the question whether Congress properly acted within its Section 5 powers by abrogating state sovereign immunity in respect to challenges to state professional and vocational licensing. Unlike Title I, which addresses the single activity of employment, Title II encompasses an array of qualitatively different governmental activities within the broad phrase, "services, programs, or activities." 42 U.S.C. § 12132. These can include, especially in light of the Attorney General's implementing regulations, construction and remodeling of public buildings, modifications of streets and highways, appointments to advisory and planning boards, contracting, licensing, and participation in services of every kind. See 28 C.F.R. § 35.130 ("General prohibitions against discrimination"). It might be argued that the very reasons why Congress exceeded its Section 5 powers with respect to licensing lead to the conclusion that Congress exceeded its Section 5 powers in enacting Title II in its entirety. But the Court need not go that far in resolving this case.

As demonstrated in Section (C), *infra*, the legislative record as reviewed by the Court in *Garrett* presented no evident examples of unconstitutional discrimination by

States against the disabled in the issuance of professional or vocational licenses. Nor are there sufficient examples of unconstitutional state discrimination against the disabled, generally, to justify Title II's regulation of state licensing as a prophylactic measure. This does not mean, however, that the same result will obtain with respect to *every* activity covered by Title II. For example, the burdens imposed by the Attorney General's implementing regulations are not identical for every service, program, or activity, but in some instances are tailored to the specific governmental activity. See, *e.g.*, 28 C.F.R. § 35.130 (general prohibitions); 28 C.F.R. § 35.150 (regarding accessibility to existing facilities).

This Court's precedents support an approach that considers Congress' authority in the context of a specific state activity that is alleged to be discriminatory on the basis of disability. Indeed, in *Garrett* itself, the Court declined to treat the ADA as a totality for purposes of the constitutional analysis. See 531 U.S. at 360 n.1. Such a narrower approach furthers the doctrine of constitutional avoidance. As this Court has stated, "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944); see also "*Ashwander v. T.V.A.*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). The ADA is "a milestone on the path to a more decent, tolerant, progressive society." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). A prudent regard for principles of separation of powers would certainly justify a focused approach to the question whether Congress could validly abrogate state

sovereign immunity for failure to make special accommodation for disability, considering the context in which the state's action is taken.

In *Brown v. North Carolina Division of Motor Vehicles*, 166 F.3d 698, 703-05 (4th Cir. 1999) (Wilkinson, J.), the Fourth Circuit followed the approach suggested herein. The court of appeals found invalid Congress' effort to abrogate the States' immunity from suits that alleged a violation of the Title II regulation prohibiting public entities from charging a fee to cover costs of accessibility programs designed to assist the disabled. Based in large measure on the doctrine of constitutional avoidance, and over the United States' objection, the Court did not review the constitutionality of Title II's abrogation provision *in toto*. *Id*. The Ninth Circuit has expressly disagreed with that approach. See *Dare*, 191 F.3d at 1173 n.2. The Board submits that the Fourth Circuit's approach is more consistent with this Court's jurisprudence.

C. This Court's review of the legislative record in *Garrett* compels the conclusion that Congress' abrogation of Eleventh Amendment immunity for federal-court damage actions was not based on evidence of any need for congressional action to remedy an historic pattern of unconstitutional discrimination by States in the issuance of professional and vocational licenses on the basis of disability.

The first prong of the test applied in *Garrett* – defining the "metes and bounds of the constitutional right in question" – was concluded by the Court in *Garrett* itself. There, the Court held that States "are not required by the Fourteenth Amendment to make special accommodations

for persons with disability so long as the state actions toward such individuals are rational." *Garrett*, 351 U.S. at 368. "If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause." *Id.* at 369. We can, therefore, turn quickly to the second prong of the test, *viz.*, ascertaining whether, in purporting to act under Section 5 of the Fourteenth Amendment, Congress had identified a history and pattern of unconstitutional licensing discrimination by States against persons with disability.[5] Petitioner submits that the conclusion of that examination in this case yields the same result as in *Garrett*.

The Court made clear in *Garrett* that what is required to satisfy this prong of the analysis is evidence of invidious, *i.e.*, purposeful, discrimination by States. See *Garrett*, 531 U.S. at 372-73, quoting *Washington v. Davis*, 426 U.S. 229, 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate

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[5] The Board does not deny Congress' *intent* to abrogate Eleventh Amendment State immunity through 42 U.S.C. § 12202. The only explanation in the ADA legislative history for the abrogation provision is the statement that it was "included in order to comply with the standards for covering states set forth in Atascadero State Hospital v. Scanlon, [473 U.S. 234] 105 S.Ct. (1985)." 1 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act, 100th Cong., 2d Sess. 1040 (Comm. Print 1990) [hereafter "Leg. Hist."] 184. In *Atascadero*, this Court interpreted section 504 of the Rehabilitation Act and emphasized that only unequivocal statutory language could abrogate the Eleventh Amendment immunity of States. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985).

impact." (emphasis in original)). As a threshold matter, one would not expect to find evidence of invidious state discrimination in licensing on the basis of disability, when – as found in *Garrett* – there is no evidence that the States are engaging in invidious discrimination in employment of persons with disability. The two matters are interrelated, for licensing is part of the process by which individuals may obtain certain types of employment. And, indeed, as the Court concluded in *Garrett* nothing in the legislative record underlying enactment of the ADA shows evidence of invidious discrimination by States against persons with disabilities in *any* activity undertaken by States, much less in the issuance of professional and vocational licenses.

Moreover, licensing proceedings involve the possibility of unconstitutional deprivation of property rights or liberty interests, and are therefore inherently infused with significant due process protections that include judicial review of allegedly discriminatory decisions within the state-court system and, to the extent an unconstitutional deprivation is alleged, potentially in this Court. Accordingly, evidence of a pattern of invidious discrimination in licensing programs would mean that there had been a pervasive breakdown in state judicial processes invoked to review allegedly arbitrary license denials based on disability. Nothing in the legislative record suggests such a breakdown.

1. The congressional findings do not reflect particular congressional concern about a pattern of historic invidious state discrimination in licensing on the basis of disability.

The ADA contains a series of "Findings" explaining why it was enacted by Congress. 42 U.S.C. § 12101.

Those Findings express Congress' concern with discrimination based on disability in the myriad facets of American society. Thus, paragraph (a)(2) finds that, "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[6] Paragraph (a)(3) finds that, "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." Paragraph (a)(5) finds that individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities. The Findings also identify several aspirational goals regarding treatment of persons with

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[6] The Findings relate disability with age, noting that some 43 million Americans "have one or more physical or mental disabilities," the number of which "is increasing as the population as a whole is growing older," *id.* at (a)(1); the Findings note that "census data, national polls, and other studies have documented that people with disabilities ... are severely disadvantaged socially, vocationally, economically, and educationally," *id.* at (a)(6); and the Findings observe that "unfair and unnecessary discrimination ... costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." *Id.* at (a)(9).

disabilities – among them "to assure equality of opportunity, full participation, independent living, and economic self-sufficiency," 42 U.S.C. § 12101(a)(8), and to provide "legal recourse" that they often have not had, *id.* at (a)(4).

Conceding that the Findings correctly state that persons with disabilities have long been subjected to "discrimination," the Findings do not remotely establish the necessary predicate for Section 5 legislation. Specifically, they do not suggest that this discrimination is all, or even in large part, attributable to unconstitutionally discriminatory actions by state government, much less discriminatory licensing decisions by States that have no rational basis. Cf., *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("It is a question of quite a different order . . . to say that the States in their official capacities, as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens.")

The sweeping and general language of the Findings reflects Congress' intent to address, not only *invidious* discrimination, but also "effects" discrimination that would not be unconstitutional even if the result of action by a State. See 42 U.S.C. § 12101(a)(5); cf. *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985) (discussing the intended reach of the Rehabilitation Act). However, as the Court confirmed in *Garrett*, Congress' authority under Section 5 is limited to remedy or prevention of *unconstitutional* conduct.

2. The legislative record underlying enactment of the ADA does not reveal evidence of a history and pattern of unconstitutional discrimination by the States

Eliminating discrimination on the basis of a person's mental or physical disability is an important social policy. But, it is "a most serious charge to say a State has engaged in a pattern and practice *designed* to deny its citizens the equal protection of the laws. . . . " *Garrett,* 531 U.S. at 375 (Kennedy, J., concurring) (Emphasis added.) The Court explained in *Garrett* that, to satisfy the test of justifying abrogation of state sovereign immunity, the legislative record must show that Congress had reason to be believe that States have been involved in a pattern of *unconstitutional* discrimination. But a review of the legislative record for evidence of such unconstitutional discrimination by States is no more helpful to Respondent than are the Findings supporting the ADA.

a. The "Task Force Report" reveals no pattern of unconstitutional discrimination by States

As noted in *Garrett*, Congress, as a prelude to enacting the ADA, created a special Task Force to assess the need for comprehensive legislation. *See Garrett*, at 370-71, and at 377-78 [Breyer, J., dissenting]. This "Task Force on the Rights and Empowerment of Americans with Disabilities," was given the mission "to gather evidence of discrimination on the basis of disability in America." 2 Leg. Hist. 1035. The Task Force held hearings in every state and received over 6,500 letters from Americans in 40 states, sharing the "pain and frustration they experience in trying to live a life of dignity." *Id.* Those documents

were mostly handwritten letters and commentary collected during the Task Force's forums. See *id.* at 1336, 1389.

Appendix C to Justice Breyer's dissent in *Garrett* is a compilation of examples of discrimination gathered by this Task Force. See *Garrett,* at 378-383 (Breyer, J., dissenting). The Court has already considered this evidence and found it lacking:

> Appendix C consists not of legislative findings, but of unexamined, anecdotal accounts of "adverse, disparate treatment by state officials." .... Of course, as we have already explained, "adverse, disparate treatment" often does not amount to a constitutional violation where rational-basis scrutiny applies. These accounts, moreover, were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities, which made no findings on the subject of state discrimination in employment. [footnote and citation omitted]. And, had Congress truly understood this information as reflecting a pattern of unconstitutional behavior *by the States*, one would expect some mention of that conclusion in the Act's legislative findings. There is none. See 42 U.S.C. § 12101.... Thus, not only is the inference Justice Breyer draws unwarranted, but there is also strong evidence that Congress' failure to mention *States* in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.

Id., at 372.

The Task Force Report findings are, therefore, no more helpful to Respondent in this case than they were to

the respondent in *Garrett*. True, the majority of anecdotal items listed in the *Garrett* Appendix C fall within the subject matter of Title II, rather than Title I. However, a large percentage of these anecdotes appear to involve programs and services of *local government,* not the *States*. Or the anecdotes are too ambiguous to ascertain what level of government is involved.[7] What functions are those of the "State" as opposed to "local government" is generally a matter of state law, and requires careful analysis of the law of the State involved. Cf., *McMillian v. Monroe County*, 520 U.S. 781 (1997) (whether official represents the State when acting in a particular capacity is "dependent on an analysis of state law.") The Court noted in *Garrett* that "[i]t would make no sense to consider constitutional violations on [the part of local government] as well as by the States themselves, when only the States are

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[7] This is apparent even from a cursory review of just the 42 listings for California. For example, 14 of the entries (numbered 181, 211, 212, 221, 222, 223, 240, 241, 244, 247, 248, 250, 252, and 253) deal with public transportation. However, in California public transportation is generally the responsibility of transit districts, which are creations of state law but which are not agencies of the State itself and therefore are not entitled to sovereign immunity under the Eleventh Amendment. See *Logan v. Southern California Rapid Transit District*, 136 Cal.App.3d 117, 125 (1982), citing *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 280 (1977). Of the remaining entries, many clearly deal with other municipal functions, *e.g.*, entries numbered 166 (inaccessible public recreation sites); 206 (inaccessible county buildings); 223 (inaccessible airport; inaccessible public transportation); 232 (person denied opportunity to serve on jury because county failed to provide interpretive services for deaf people); 246 (inaccessible restrooms in county administration building; lack of curb cuts); and 254 (inaccessible county courthouse; street signals too fast for safe crossing by wheelchair).

the beneficiaries of the Eleventh Amendment." *Garrett*, 531 U.S. at 369.

The whole of Appendix C lists only nine references arguably relating to denials of a professional or vocational license. *Id.* at 398-420 (Appendix C, Nos. 261, 479, 732, 808, 1476, 1503, 1542, 1543, 1549.) None of these listings evinces unconstitutional discrimination by States, much less a pattern of such unconstitutional discrimination.

The anecdotal record reflected in Appendix C cannot reasonably be characterized as evidence of pervasive invidious state discrimination in licensing – or, indeed, in any other state activity – such as had "become a problem of national import." Cf. *Florida Prepaid,* 527 U.S. at 641 (1999).

b. Congress was aware that States had already enacted legislation to prohibit discrimination on the basis of disability.

Not only is the legislative record devoid of evidence of a pattern of invidious discrimination by States on the basis of disability, but as the Court in *Garrett* recognized, Congress was aware that, in many cases, the States were ahead of the Federal Government in protecting the rights of persons with disabilities.

> [B]y the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that "this is probably one of the few

> times where the States are so far out in front of the Federal Government, it's not funny."

Garrett, at 368, n.5, citing Hearing on Discrimination Against Cancer Victims and the Handicapped before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 100th Cong., 1st Sess., 5 (1987). Indeed, during Congressional hearings on the ADA, legislators and witnesses alike repeatedly noted that most States already had their own laws intended to prevent discrimination on the basis of disability. See *e.g.*, Hearing Before the House Subcommittee on Select Education, 101 Cong. 8 (Aug. 28, 1989) (Rep. Bartlett); Hearing Before the House Subcommittee on Employment Opportunities, 100 Cong. 86 (June 17, 1987) (Barbara Hoffman, Esq., Coalition for Cancer Survivorship); *Id.*, 101 Cong. 1 (Sept. 13, 1989) (Rep. Martinez); S. Rep. No. 101-116, at 84 and 92 (1989); 101 Cong. 7 (June 17, 1989) (Rep. Biaggi).

California, for example, has a long history of taking affirmative steps to end discrimination on the basis of a person's disability. Starting in 1968 – twenty years before enactment of the ADA – the Unruh Civil Rights Act began protecting the rights of persons with disabilities in California. See Cal. Civ. Code §§ 50, *et seq.*, §§ 54-55.1. California also provides additional protections and remedies to persons with disabilities under its Fair Employment and Housing Act, Cal. Govt. Code §§ 12900, *et seq*. See *e.g.*, §§ 12944 and 12948. Enacted eight years before the ADA, California's Government Code § 12944 specifically prohibits unlawful discrimination on the basis of a disability by state licensing Boards, and has other requirements to protect the rights of persons with disabilities. In addition California's Government Code §§ 4450-4459 requires provision of accessible facilities when constructed with

state or local agency funds. Furthermore, California's Medical Practice Act, under which Petitioner is governed, contains specific provisions for addressing licentiates with mental or physical illnesses. See Cal. Bus. & Prof. Code §§ 480, 822, 2221.

D. As was the case in *Garrett*, even if the legislative record could be said to disclose sufficient evidence of a pattern of unconstitutional state discrimination to justify preventive action under Section 5, the record would still not justify the incongruent and disproportionate remedy of abrogation of Eleventh Amendment immunity.

The Court has recently emphasized that "prophylactic legislation under § 5 must have a 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *United States v. Morrison*, 529 U.S. 598, 625-26, citing *Florida Prepaid*, 527 U.S. at 639. The Court's analysis in *Garrett* leads inexorably to the conclusion that Title II's abrogation of sovereign immunity is neither proportionate nor congruent to the ends sought to be achieved.[8]

[8] Of course, the United States retains the power to sue States for alleged violation of Title II, and injunctive relief is available against non-complying state officials under *Ex parte Young*, 209 U.S. 123 (1908).

1. As was true in *Garrett* with respect to Title I, the remedy of abrogation under Title II is disproportionate to the limited anecdotal evidence of state discrimination.

The Court noted in *Garrett* that the evidence of unconstitutional discrimination by States based on disability, such as it was, could not fairly be compared to the record of historic and pervasive discrimination by States against racial minorities that supported enactment of the Voting Rights Act. *Garrett,* 351 U.S. at 373. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court noted that Congress developed a formula under which the Voting Rights Act restrictions would apply only in locations where indicia of discrimination, such as literacy tests and low voter registration, were present. The most sweeping provisions would apply only to locations that had the greatest likelihood of a prevalent practice of racial discrimination. *Id.* at 330-32. Individual States were brought under coverage, not by Congressional fiat, but rather by "appropriate administrative determination which have not been challenged in this proceeding" *Id.* at 318. Congress also created a termination procedure whereby the Voting Rights Act's restrictions could be lifted if a State complied with the Act. *Id.* at 331-33; see also, *City of Rome v. United States,* 446 U.S. 156, 177 (1980) (upholding federal Voting Rights Act directives on States in narrowly tailored instances.) In sum, Congress' response to the shameful legacy of racial discrimination in voter registration was dramatic yet restrained, "a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified." *Garrett*, at 373. In contrast, as was the case with Title I, Congress' abrogation of the

Eleventh Amendment under Title II is not similarly restrained.

Title II is not as limited in application as was the Voting Rights Act. It applies to all States, irrespective of their own anti-discrimination laws and history, and provides for no termination of "coverage" upon sufficient demonstration of compliance.[9] As this Court has made clear: "This is not to say . . . that § 5 legislation requires termination dates, geographic restrictions, or egregious predicates." *City of Boerne,* 521 U.S. at 533. But "[w]here a congressional enactment pervasively prohibits *constitutional* state action in an effort to remedy or to prevent *unconstitutional* state action, limitations of this kind tend to ensure Congress' means are proportionate to the ends legitimate under § 5." *Ibid.*

This Court in *Garrett* concluded that the limited evidence (at best) of invidious discrimination by States on the basis of disability could not justify invasion of the immunity guaranteed to the States by the Eleventh Amendment. Cf., *Kimel,* 528 U.S. at 86; *Florida Prepaid,* 527 U.S. at 647; *United States v. Morrison,* 529 U.S. 598, 627 (2000.) No different conclusion is reasonably possible in this case.

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[9] Indeed, as the Board noted earlier, California's own statutory prohibition against discrimination in licensure on the basis of disability *antedated* the ADA by eight years. See Cal. Govt. Code § 12944; Cal. Stats. 1980, ch. 992, § 4.

2. As was true in *Garrett* with respect to Title I, the remedy under Title II is not congruent with an intended effort to end unconstitutional discrimination in professional and vocational licensing by States.

In *Garrett*, the Court concluded that the requirements of Title I had the effect of imposing a greater burden on States to justify a failure to make special accommodation for disability, than is required by the Fourteenth Amendment:

> For example, whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to 'make existing facilities used by employees readily accessible to and usable by individuals with disabilities.' 42 U.S.C. §§ 12112(5)(B), 12111(9). The ADA does except employers from the "reasonable accommodation" requirement where the employer 'can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.' § 2112(b)(5)(A). However, even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer. The Act also makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision . . . The ADA also forbids "utilizing standards, criteria, or methods of administration" that disparately impact the disabled, without

> regard to whether such conduct has a rational basis. § 12112(b)(3)(A).

Garrett, 531 U.S. at 372-73.

The same is true with respect to the requirements of Title II. The Attorney General's implementing regulations provide that "[a] public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. . . . " 28 C.F.R. § 35.130(a)(6). States are required to accommodate applicants with disabilities unless the State can show that the special accommodation "would fundamentally alter the nature of the service, program, or activity." *Id.* at (a)(7). However, the *Constitution* would permit a State to decline to make special accommodation, so long as the decision has a rational basis. *Garrett*, 531 U.S. at 367. In the case of the Medical Board, that rational basis is most commonly effectuation of its charge to protect public health and safety. See Cal. Bus. & Prof. Code § 2220.

Congress' power under Section 5 does not permit Congress to impose a greater level of scrutiny for state justification of failure to make special accommodation in professional and vocational licensing than is required by the Constitution itself. As the Court concluded in *Garrett*, "to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*." *Garrett*, 531 U.S. at 374.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decision should be reversed, and the District Court's judgment reinstated.

Respectfully submitted,

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January 10, 2003